MBF FACTORS SDN BHD

v.

ORGAVYL TOPLINE MARKETING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NOS: R2-12-174-1999 & R1-12-177-1999]
13 JANUARY 2000

CIVIL PROCEDURE: *Affidavits - Affidavit replying to an affidavit in reply - Service - Time limit for compliance - Whether not less than 14 clear days before return day - Whether two clear days before hearing date sufficient - Subordinate Courts Rules 1980, O. 7 r. 16, O. 26A r. 2(3)*

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit replying to an affidavit in reply - Service - Time limit for compliance - Whether not less than 14 clear days before return day - Whether two clear days before hearing date sufficient - Subordinate Courts Rules 1980, O. 7 r. 16, O. 26A r. 2(3)*

The plaintiff served its notice of application for summary judgment together with an affidavit in support and exhibits thereto on the defendant on 8 March 1999. The defendant served its affidavit-in-reply on the plaintiff on 6 May 1999. The plaintiff then served its affidavit-in-reply ('the said affidavit-in-reply') on 10 June 1999. On the hearing date of the plaintiff's application on 14 June 1999, the sessions judge allowed the defendant's preliminary objection ('PO') on the invalidity of the plaintiff's said affidavit-in-reply on the ground that it did not comply with O. 26A r. 2(3) Subordinate Courts Rules 1980 ('SCR'), although the objection raised was on the non-compliance of O. 24 r. 4(2)(b) SCR. Consequently, the sessions judge proceeded with the hearing of the plaintiff's application for summary judgment without considering the said affidavit-in-reply and dismissed the application. Hence, the instant appeal by the plaintiff.

Held:

[1] The sessions judge was right in not allowing the defendant's PO on non-compliance of O. 24 r. 4(2)(b) SCR. Order 24 applies to applications and proceedings in chambers whilst the hearing of the plaintiff's application for summary judgment is a hearing to be conducted in open court by virtue of O. 26A r. 3(1) SCR. However, the sessions judge was wrong in law to allow the defendant's PO based on O. 26A r. 2(3) SCR as it was never raised by the defendant before the sessions judge as a ground for its objection.

[2] Order 26 r. 2(3) SCR clearly states that the notice of application, a copy of the affidavit in support and exhibits thereto must be served on the defendant 14 clear days before the return day. The plaintiff's said affidavit-in-reply did not come within the 2nd limb of O. 26A r. 2(3) as the said affidavit-in-reply was a reply to the defendant's allegation in the defendant's affidavit-in-reply and was not an affidavit in support of the plaintiff's application. In *DCB Bank Berhad v. NS Bahtera Sdn Bhd & Ors*, it was held that a plaintiff has a right of reply to the defendant's show cause affidavit in a summary judgment application. As such, O. 26A r. 2(3) is not applicable to a plaintiff's affidavit-in-reply to a defendant's show cause affidavit-in-reply.

[3] The general provision under O. 7 r. 16 SCR applies where any document required to be served on a person must be served at least two clear days before the day appointed for hearing of the proceedings. The plaintiff's said affidavit-in-reply was served on the defendant on 10 June 1999, *ie*, two clear days before the hearing date of 14 June 1999.

[4] The sessions judge had the discretion to cure any irregularities (if any) under O. 2 r. 1(2) SCR and therefore should have allowed the plaintiff's said affidavit-in-reply. The sessions judge should have granted an adjournment (by consent of both parties) subject to question of costs of the day (if any) to be borne by the defendant.

[5] In the event the sessions judge was correct in his interpretation that the plaintiff's affidavit-in-reply came within the purview of "… the affidavit in support …" under O. 26A r. 2(3) SCR, it meant that there was a "short service" of the plaintiff's notice of application for summary judgment upon the defendant. Consequently, the sessions judge should have granted an adjournment and should not have proceeded with the hearing of the plaintiff's application.

[6] The sessions judge erred in law in allowing the defendant's PO. The plaintiff's said affidavit-in-reply should have been taken into consideration as it was a court document properly filed with the Sessions Court Registry.

[Plaintiff's appeal allowed with costs with consequential orders.]

Case(s) referred to:

Autron Sdn Bhd v. Goh Eng Hwa Construction [1997] 4 CLJ 43 ***(refd)***

DCB Bank Bhd v. NS Bahtera Sdn Bhd & Ors [1999] 1 CLJ 513 ***(refd)***

Muniandy Thamba Kaundar & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***

Legislation referred to:
Federal Constitution, art. 135
Subordinate Courts Rules 1980, O. 2 r. 1(2), O. 7 r. 16, O. 24 r. 4(2)(b), O. 26A rr. 2(3), 3(1)

Other source(s) referred to:
Supreme Court Practice, 1979, p 962

For the plaintiff/appellant - Kingston TK Tan; M/s Heiley Hassan, Tan & Partners
For the defendant/respondent - R Santhirakala; M/s Wong Kuo Shing & Co

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:
These are the plaintiff's two appeals filed on 28 June 1999 against the decision of the Sessions Court judge in allowing the defendant's preliminary objection with regards to the admissibility of the plaintiff's affidavit-in-reply affirmed by Hu Chee Hong on 9 June 1999 (see p. 43 of the Record of Appeal; hereinafter referred to as "the appellant's said affidavit-in-reply). The facts are as follows: The plaintiff's notice of application dated 2 February 1999 for summary judgment (p. 1 of the Record of Appeal) together with affidavit-in-support dated 14 January 1999 and exhibits thereto (p. 29 of Record of Appeal) were served on the defendant's solicitors on 8 March 1999. The defendant's affidavit-in-reply dated 6 May 1999 (p. 35 of the Record of Appeal) was served on the plaintiff's solicitors on 6 May 1999. The plaintiff's said affidavit-in-reply was both filed and served on the defendant's solicitors on 10 June 1999. The hearing date of the plaintiff's notice of application dated 2 February 1999 was fixed on 14 June 1999. On 11 June 1999, the defendant's (then) solicitor, Mr. Gary C.Y. Teh telephoned the plaintiff's solicitor, Mr. Kingston Tan requesting an adjournment of the hearing of 14 June 1999 to enable the defendant to file their further affidavit-in-reply; whereby the plaintiff confirmed that the plaintiff has no objections to a next adjournment thereto. On the hearing date of 14 June 1999, the Sessions Court judge refused to grant an adjournment to the defendant's solicitors in order to file and serve their further affidavit-in-reply to the plaintiff's said affidavit-in-reply, (although the plaintiff's solicitors had informed the court the plaintiff had no objections thereto); whereupon the defendant's solicitors raised a preliminary objection as to the validity of the plaintiff's said affidavit-in-reply, on two grounds namely:

(i) That the plaintiff's said affidavit-in-reply did not comply with O. 24 r. 4(2)(b) of the Subordinate Courts Rules 1980; and

(ii) That the plaintiff's said affidavit-in-reply did not contain exh. "HCH6" (p. 366 of Record of Appeal) therein.

and prayed for the plaintiff's said affidavit-in-reply to be disregarded by the court.

With regard to the second ground, the plaintiff pointed out to the Sessions Court judge that the defendant had in fact received the complete set of the plaintiff's affidavit-in-reply together with exhibit therein, as confirmed by the defendant's solicitors stamp as duly acknowledged by the plaintiff's covering letter dated 10 June 1999. However, the plaintiff's solicitors further obliged the defendant's solicitors by faxing exh. "HCH6" to the defendant's solicitors on 11 June 1999. The Sessions Court judge on 14 June 1999 allowed the defendant's preliminary objection but based his decision only on the failure of the plaintiff to comply with O. 26A r. 2(3) Subordinate Courts Rules 1980, that is, the plaintiff had failed to serve their said affidavit-in-reply and exhibit thereto on the defendant fourteen (14) clear days before the return day and not on O. 24 r. 4(2)(b) of the Subordinate Courts Rules 1980 (see Certified True Copy of Order dated 14 June 1999 (p. 1 to 2 of Supplementary Record of Appeal). Consequently on 14 June 1999, the Sessions Court judge proceeded with the hearing of the plaintiff's summary judgment *vide* notice of application dated 2 February 1999 without considering the plaintiff's said affidavit-in-reply and dismissed the plaintiff's said summary judgment on 23 June 1999.

It is clear from the Order dated 14 June 1999 that the court had accepted the plaintiff's explanation in respect of and in reply to the second ground of the defendant's preliminary objection. The learned Sessions Court judge was right in not allowing the defendant's first ground of preliminary objection based on O. 24 r. 4(2)(b) of the Subordinate Courts Rules 1980. Since O. 24 pertains to applications and proceedings in chambers and by virtue of O. 26A r. 3(1) Subordinate Courts Rules 1980, the hearing of the plaintiff's application shall be conducted in open court (see *Autron Sdn. Bhd. v. Goh Eng Hwa Construction* [1997] CLJ JT(11)).

I am of the opinion that the learned Sessions Court judge was wrong in law to allow/uphold the defendant's preliminary objection based on O. 26A r. 2(3) of the Subordinate Courts Rules 1980 on the following reasons:

Order 26A r. 2(3) of the Subordinate Courts Rules 1980 was not and never raised before the Sessions Court by the defendant as a ground of his preliminary objection. Order 26A r. 2(3) of the Subordinate Courts Rules 1980 states clearly:

> The notice, a copy of the affidavit-in-support and of any exhibits referred to there in must be served on the defendant not less than 14 clear days before the return day.

Hence, what needs to be served 14 clear days before the return day under O. 26A r. 2(3) are:

(a) the notice of application, and

(b) a copy of the affidavit-in-support and exhibits thereto.

The plaintiff's said affidavit-in-reply does not come within the 2nd limb of O. 26A r. 2(3), as the plaintiff's said affidavit-in-reply is a reply to the defendant's allegation in its affidavit-in-reply dated 6 May 1999 (p. 35 of the Record of Appeal) and not an affidavit in support of the plaintiff's application. This is based on the case of *DCB Bank Berhad v. NS Bahtera Sdn. Bhd. and Others* [1999] 1 CLJ 513 decided by Abdul Aziz Mohamad J (hereinafter referred to as the "*DCB Bank* case"), wherein he held that a plaintiff has a right of reply to the defendant's show cause affidavit in a summary judgment application. On p. 516 at para d he stated:

> The facility of summary judgment afforded by the rules is a beneficial thing. It saves unnecessary loss of time and expense in going to trial where there is actually no defence. The defendant ought not to be accorded his common law right to appear in court and defend if it can be shown earlier that he does not have a defence. While it is important that a plaintiff should not abuse the facility, it is equally important that a defendant be not allowed to easily escape summary judgment and that therefore the plaintiff be given the right to show that the defendant's attempt to raise triable issues to escape summary judgment is a sham or is misconceived.

As such, O. 26A r. 2(3) of the Subordinate Courts Rules 1980 is not applicable to a plaintiff's affidavit-in-reply to a defendant's show cause affidavit-in-reply. On the other hand, the general provision under O. 7 r. 16 of the Subordinate Courts Rules 1980 applies, that is, any document required to be served on a person must be served at least two (2) clear days before the day appointed for hearing of the proceedings. The plaintiff's said affidavit-in-reply was served on the defendant on 10 June 1999, that is, two (2) clear days before the hearing date of 14 June 1999. Article 135 of the Federal Constitution enshrines an individual's right to be heard, ie, codifying the doctrine of *audi alteram partem* ie, the rules of natural justice. In the case of *Muniandy a/l Thamba Kaundar and Another v. D & C Bank Berhad & Another* [1996] 2 CLJ 586, at p. 594 the Federal Court held:

> It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the *maxim audi alteram partem*,

and

> The Laws of God and man both give the party an opportunity to make his defence, if he has any.

In any event, the court has the discretion to cure any irregularities (if any) under O. 2 r. 1(2) of the Subordinate Courts Rules 1980 and therefore should have allowed the plaintiff's said affidavit-in-reply to be admissible. The court should have granted an adjournment (by consent by both parties) subject to question of costs of the day (if any) to be borne by the defendant. (See definition of "costs of the day" – *The Supreme Court Practice* 1979, p. 962 – This means "all costs incurred and which will be thrown any ... in consequence of the postponement of a cause ...")

Alternatively, in the event the Sessions Court judge was correct in his interpretation of O. 26A r. 2(3) of the Subordinate Courts Rules 1980 that the plaintiff's said affidavit-in-reply is within the purview of "... the affidavit-in-support ..." under O. 26A r. 2(3) of the Subordinate Courts Rules 1980, it necessarily means there was "short service" of the plaintiff's said notice of application dated 2 February 1999 for summary judgment on the defendant on 10 June 1999. Consequently, the Sessions Court judge should have granted an adjournment (by consent of both parties) subject to costs of the day to be borne by the plaintiff and should not have proceeded forthwith with the hearing of plaintiff's said summary judgment application on 14 June 1999. I am of the opinion the learned Sessions Court judge had erred in law in allowing the defendant's preliminary objection. The plaintiff's said affidavit-in-reply dated 9 June 1999 should have been taken into consideration by the Sessions Court since it is a court document properly filed with the Sessions Court Registry *vide* official receipt No. WR 884570 on 10 June 1999. Therefore the plaintiff's appeal is allowed with costs in the cause. Consequently therefore:

(i) the order allowing the preliminary objection by the defendant is set aside;

(ii) the order that the plaintiff's affidavit-in-reply dated 9 June 1999 which is filed and received on 10 June 1999 which is expunged and set aside is hereby restored to file and be admissible;

(iii) in the case of R1-12-177-99 where the order of 23 June 1999 dismissing the summary judgment application by the plaintiff in Lampiran (5) is hereby set aside and the case to be reheard and retried *de novo* and Sessions Court No. (5) is to fix the case for hearing immediately.